

*United States Court of Appeals
for the Second Circuit*



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

75-7113

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

JAMES MARTIN, ANGELO LEONARDI, CARMINE
LAVIA, RONALD DARIENZO, BRUCE DOAK and
CARMINE APUZZO,

B
L/S
Plaintiffs-Appellants,

-against-

MARIO MEROLA, District Attorney, Bronx County,
and individually, A.D.A. DWIGHT DARCY and
A.D.A. STANLEY CHESLER,

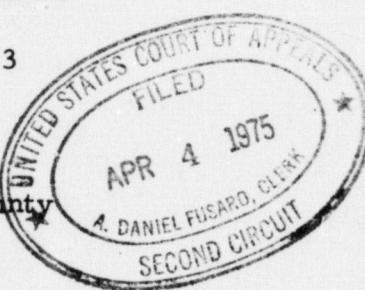
Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

ROTHBLATT, ROTHBLATT, SEIJAS & PESKIN
Attorneys for Plaintiffs-Appellants
232 West End Avenue
New York, New York 10023
(212) 787-7001

HON. MARIO MEROLA
District Attorney, Bronx County
851 Grand Concourse
Bronx, New York



(4675A)

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PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

74 CV. 4453
JUDGE BRIEANT

D. C. Form No. 106 Rev.

Jury demand date:

TITLE OF CASE

ATTORNEYS

JAMES MARTIN,
ANGELO LEONARDI,
CARMINE LAVIA,
CARMINE APUZZO,
RONALD DARIENZO, VITO SUMMA,
BRUCE DOAK,

For plaintiff:

Rothblatt Rothblatt Seijas & Peskin
232 West End Av, NYC 10023 787-7001

VS

MARIO MEROLA, D.A. BRONX COUNTY JUG 1-31-75
and individually.
P.O. SAL BANASEVINEO,
P.O. "JOHN" HARDEMAN,
P.O. "JOHN" NIXON,
A.D.A. DWIGHT DARCY, JUG 1-31-75
DET. MIKE TERILLY,
P.O. DONALD SULLIVAN,
DET. JOHN RYAN,
A.D.A. STAN CHESLER JUG 1-31-75

For defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed x	Clerk	1/14/74 1/17/74	Rothblatt Rothblatt Seijas Peskin	15 11
J.S. 6 mailed	Marshal			
Basis of Action: Civil rights. \$9,000,000.00	Docket fee Witness fees			
Action arose at:	Depositions			

JUDGE BRIEANT

DATE	PROCEEDINGS	Date Order Judgment N
Oct 10-74	Filed complaint & issued summons.	
Oct 31-74	Filed Summons With Marshal's returns-Served:	
	Mario Merola	dtd:10-17-74 by:Sampson
	P.O. Sal Banasevino	dtd 10-17-74 " "
	P.O. John Hardeman	" " " " " "
	P.O. John Nixon	" " " " " "
	A.D.A.A. Dwight Darcy	" " " " " "
	Det. Mike Terilly	" " " " " "
	P O . Donald Sullivan	" " " " " "
	Det. John Ryan	" " " " " "
	A.D.A. Stan Chesler	" " " " " "
Nov 1-74	Filed Deft's, Merola, Darcy & Chesler, Affdvt and Notice of Motion to dismiss complaint against them.	
Nov 11-74	Filed Memorandum of Law in support of Deft's notice of motion to dismiss complaint.	
Nov 14-74	Filed Stip & Order that Defts motion to dismiss the complaint is ad 'd to 12-3-74, SO ORDERED. —BRIEANT, J.	
Dec 3-74	Filed Pltff's Affirmation in opposition to defts Merola's motion to dis iss	
Dec 3-74	Filed Memo. of Law by Pltff. in opposition to deft's motion to dismiss..	
Dec 27-74	Filed Defts' Notice of Mtion for an order dismissing the complt..ret. 1-7-75.	
Dec 27-74	Filed Defts' Memo of Law in support of mtion to dismiss.	
Jan 7-75	Filed Stip. & Order that defts' motion to dismiss the complt. is adj. to 1-17-75. at 9:30am Room 106...Brieant, J.	
Jan 16-75	Filed Pltffs' Memorandum of Law in opposition to defts' motion to dismiss.	
Jan 23-75	Filed memorandum & Order....Defts. merola, Darcy and Chesler have moved to dis miss the compit. herein pur. to Rule 12(b)(5),F.R.Civ.P. for failure to state a claim. The Court has read affdvts. and exhibits submitted by both sides of litigation, and treats the motion as having been made under Rule 56.....Summary Judgment is granted and the complt. is dismissed as to movants Merola, Darcy and Chesler. There is no just reason for delay. Rule 54(b).F.R.Civ.P. ...O,ur Clerk shall enter final judgment in favor of all three movants dismissing the complt. and denying all relief as to them...Brieant,J. m/n	
Jan 24-75	Filed memo-End on back of defts' motion filed 12-27-74....The within motion is granted to the extent that the complt. is dismissed as against these movants,(Banasevino, Hardeman, Sullivan, Nixon, Terilly, and Ryan)with leave to file an amended complt within 20 days. The amended complt shall specificity to permit an informed responsive pleading, the facts relied on to show personal involvement by each deft. police officer, stated separately, in order that the Court may ascertain what each such deft. did, and whether or not such conduct was within the limited immunity availab;e to these movants. So Ordered.... Brieant, J...m/n	
Jan 31-75	Filed Judgment.....Ordered that deft Mario Merola, Dwight Darcy and Stan Chesler have judgment against the pltffs. James Marin, Angelo Leonardi, Carmine Lavia, Carmine Apuzzo, Ronald Darienzo and Bruce Doak, dismissing the complt. and denying all relief...Raymond F. Burghardt, Clerk. 1-31-75--Approved Brieant,J. ...m/nent. 2-3-75.	
Feb 10-75	Filed Pltffs' Notice of Appeal to USCA from order ent. 1-23-75 and Jugment ent. 1-31-75....Copy mailed on 2-11-75 to : Mario Merola D.A. Bx. County.	
Feb 11-75	Filed Memo-End on back of Unsigned Order to Show Cause of Pltff.....Ordered that the time within which pltffs. may serve and file their amended complt. is extended until 4:45 PM on 2-28-75, such extensi n being granted without not ice in the discretion of the Court...Brieant,J. m/n	

CIVIL DOCKET

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MARTIN
ANGELO LEONARDI
CARMINE LAVIA
RONALD DARIENZO
BRUCE DOAK

CARMINE APUZZO

-against-

MARIO MEROLA, E .A. BRONX COUNTY and
individually

P.O. SAL BANASEVINEO	DET. MIKE TERILLY
P.O. "JOHN" HARDEMAN	P.O. DONALD SULLIVAN
P.O. "JOHN" NIXON	DET. JOHN RYAN
A.D.A. DWIGHT DARCY	A.D.A. STAN CHESLER

Now come plaintiffs and state as follows:

I. Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Sec. 1343(3) this being a suit in equity which is authorized by law, Title 42, United States Code, Sec. 1983, to be brought to redress the deprivation under color of State Law, statute, ordinance, regulation, custom, or usage of rights, privileges and immunities, secured by the Constitution and laws of the United States or by any act of Congress providing for equal rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Sec. 1981, as herein after more fully appears.

Complaint

II. Parties

2. Plaintiffs herein are named defendants in several indictments which were returned by a specially empanelled Grand Jury in the Bronx County on August 2, 1974.

3. Pursuant to these indictments, warrants of arrest were obtained for the plaintiffs and executed on August 7, 1974. The Plaintiffs were not given an opportunity to surrender. However, several of the plaintiffs, through their attorneys, notified the Bronx District Attorneys Office of their intentions to do so.

4. Defendants:

A. Mike Terilly and John Ryan are detectives in the New York City Police Department assigned to the Bronx District Attorney's office squad.

B. "John" Hardeman is a police sergeant with the New York City Police Department.

C. "John" Nixon is a police officer with the New York City Police Department assigned to the Bronx.

D. Donald Sullivan is a police officer in the New York City Police Department assigned to the Bronx District Attorney's Office Squad.

E. Mario Merola is the District Attorney of the Bronx County.

F. Sal Banasevino is a police officer with the New York City Police Department assigned to the Bronx.

Complaint

G. Dwight Darcy and Stan Chesler are Assistant District Attorneys with the Bronx County District Attorneys Office.

III. Specific Acts

5. Carmine Apuzzo's arrest was the most shocking act of all. This Plaintiff is suffering from exaggerated diabetes and terminal cancer. He is expected to die within the next few months.

6. At 10:30 A.M. on August 7, 1974, while Carmine was en route to his doctor's office to receive an x-ray treatment and insulin injection, he was stopped and pursuant to a warrant, arrested by the defendants. The defendants were aware of the Plaintiff's medical condition, yet with a blatant, wanton, and malicious disregard thereof, the defendants prohibited the Plaintiff from going to his doctor to receive his treatment and injection, and Plaintiff was instead transported to the Bronx County District Attorneys Office where he was harassed, and detained, without purpose or justification, for a total of three hours. During this period of time, Plaintiff made repeated requests of the defendants to call his doctor so that he could obtain his x-ray treatment and insulin injection. These requests were ignored. At 7:00 P.M. the Plaintiff was taken to the detention facility at 161st Street and Washington Avenue, where he was detained in the bull pen. The Plaintiff spent the entire night, from arrest until arraignment the following morning without food or drink, without any medical assistance whatsoever, and without the most basic of sleeping provisions.

Complaint

7. At 9:30 A.M., August 8, 1974, Plaintiff was taken before a judge for the purpose of being arraigned. The Plaintiff remained in Court for approximately 5 hours, during which time the Plaintiff frantically requested his tumor medicine and insulin injection. The judge said that before any medical treatment could be administered, the Plaintiff would have to produce written medical proof of his condition. Of course, it was impossible for Plaintiff to fulfill this request as he was detained without opportunity to contact his doctor. Moreover, the Defendants were actually aware of the Plaintiff's condition and yet they did not offer to the judge the slightest information with respect thereto.

8. Plaintiff was finally released on bail the following morning. During this period of approximately 48 hours, Plaintiff Apuzzo, suffering from diabetes and terminal cancer, was denied medical treatment and food and forced to sleep on a cold dirty stone floor with no pillow or blanket. Defendants were at all times aware of the Plaintiff's condition. Yet, with a cold hardness, surpassed only by the floor Plaintiff was forced to sleep on, the defendants wantonly and maliciously denied Plaintiff his most fundamental and basic rights guaranteed by the 4th, 5th, 6th, 8th, 13th, and 14th Amendments to the Constitution of the United States.

9. On October 28, 1973, Angelo Leonardi had massive open

Complaint

heart surgery. One year prior thereto, Plaintiff Leonardi suffered a major debilitating stroke. With knowledge of Plaintiffs imminent indictment and his fragile medical condition Attorney HENRY B. ROTHBLATT contacted the Police to arrange for the Plaintiff's surrender. Defendants disregarded Mr. Rothblatt's request and on August 7, 1974 the Defendants pursuant to a warrant arrested Plaintiff Leonardi. Because of his obvious physical illness, Plaintiff was taken to Jacoby Hospital by the Defendants. However, the Plaintiff was not allowed to go to his own hospital or be treated by his own physician who was the only one familiar with Plaintiff's required physical treatment.

10. Subsequently, Plaintiff Leonardi was taken to jail where he was held for 18 hours, and like Plaintiff Apuzzo, without food or sleeping provisions. In addition, he was not allowed to see a doctor, and the medicine Plaintiff took for his heart was confiscated. Furthermore, with actual knowledge of the Plaintiffs medical condition, the defendants did, among and between themselves, aid, abet and conspire to, with wanton and wilful malice and neglect, deprive this Plaintiff of his Constitutional Rights as guaranteed by the 4th, 5th, 6th, 8th, 13th, and 14th Amendments to the Constitution of the United States.

11. The defendants with blatant, wanton and wilful malice, in contravention of the express mandates of the American Bar Association and the New York Bar Association Codes of Professional Responsibility, and in derogation of Plaintiffs 4th, 5th, 6th,

Complaint

8th, 13th, and 14th Amendments Rights under the Constitution of the United States, did, on the 2nd, 8th, and 9th days of August 1974, issue press releases and statements to the various news media, Radio, Television, Newspapers, including the New York Times, New York Post, New York Daily News, and the Times Herald Record to the effect that the Plaintiffs were "linked directly to the Tramunti and Columbo Crime Families"....."linked to Mafia Crime Families," "Vultures" "tiedstrongly,....with Tramunti crime family."

12. Defendants thus participated in a criminal matter and made and or participated in the making of extrajudicial statements knowledgeably calculated to prejudice and defame the Plaintiffs.

13. Additionally, the defendants while executing a search warrant did, without probable cause and in direct contradiction to the mandates of the warrant, act in an unconstitutional and oppressive manner in that the Defendants failed to limit the scope, nature and purpose of their search and did in fact, intrude and invade upon the Plaintiffs constitutionally protected zones of privacy.

14. Furthermore, defendants acted in an unprofessional manner in that they made and/or sanctioned others in issuing press releases, statements and other disclosures of information, for release to the public by newspaper, radio, television and other means of public information, relating to a pending criminal prosecution, the purpose and effect of which was to prejudice and

Complaint

interfere with a fair trial and the due administration of justice, in violation of the Defendants 4th, 5th, 6th, 8th, 13th and 14th Amendment Rights under the Constitution of the United States.

15. Defendants in all respects did act in the County of the Bronx, and New York with actual knowledge and beyond the scope and authority delegated them. Defendants acted with flagrant, wanton and malicious disregard for the Rights of the Plaintiffs and in so doing did deprive and deny the Plaintiffs of the Constitutional Rights under the 4th, 5th, 6th, 8th, 13th and 14th Amendments to the Constitution of the United States, all to Plaintiffs damage in the sum of \$13,000,000.

WHEREFORE, Plaintiffs pray that Defendants be summoned to appear and answer herein and that Plaintiffs have judgment for their damages, costs of suit and such other and further relief as they may show themselves justly entitled to receive.

DATED: NEW YORK, NEW YORK
September 6, 1974

ROTHBLATT, ROTHBLATT,
SEIJAS & PESKIN
232 West End Avenue
New York, New York 10023
(212) 787-7001

Complaint

STATE OF NEW YORK)) SS.:
COUNTY OF BRONX))

We, the undersigned, being duly sworn, depose and say:

We are the plaintiffs in the within action. We have read the foregoing summons and complaint in the within civil rights action and know the contents thereof. The contents are true to our own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters we believe it to be true.

JAMES MARTIN

ANGELO LEONARDI

CARMINE LAVIA

RONALD DARIENZO

BRUCE DOAK

CARMINE APUZZO

Sworn to before me this 25th
day of September, 1974.

Notice of Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MARTIN, et al.,

Plaintiffs,

- against -

NOTICE OF MOTION

74 Civ. 4453
(C.L.B.)

MARIC MEROLA, District Attorney,
Bronx County, et al.,

Defendants.

SIRS:

PLEASE TAKE NOTICE, that upon the complaint and summons herein, dated the 7th day of October, 1974, and the annexed affidavit of Robert M. Cohen, Assistant District Attorney in Bronx County, State of New York, sworn to the 31st day of October, 1974, the undersigned will move this Court before Judge Brieant at Courtroom 1105, United States Courthouse, Foley Square, City of New York, on the 14th day of November, 1974 at 9:30 in the forenoon or as soon thereafter as counsel can be heard, for an order dismissing the complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Fed. R. Civ. P., and for such other and further relief as the Court may

Notice of Motion

deem just and proper.

Dated: Bronx, New York
October 31, 1974

Yours, etc.,

MARIO MEROLA
District Attorney
Attorney for Defendants
Merola, Darcy and Chesler
Office & P.O. Address
851 Grand Concourse
Bronx, New York 10451
Tel. (212) 588-9500

By: Robert M. Cohen
ROBERT M. COHEN
Assistant District Attorney

Affidavit of Robert M. Cohen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MARTIN, et al.,

Plaintiffs,

- against -

AFFIDAVIT

MARIO MEROLA, District Attorney,
Bronx County, et al.,

74 Civ. 4453
C.L.B.

Defendants.

STATE OF NEW YORK }ss:
COUNTY OF BRONX }

ROBERT M. COHEN, being duly sworn, deposes and says:

1. I am an Assistant District Attorney in the Office of MARIO MEROLA, District Attorney of Bronx County, one of the defendants in the above-captioned matter, and attorney for defendants Dwight Darcy and Stanley Chesler. I submit this affidavit in support of said defendants' motion to dismiss the complaint against them.

2. Carmine Apuzzo, along with three others, was indicted by the Grand Jury of Bronx County on July 19, 1974 (No. 1798/1974) for the crimes of Conspiracy in the Third Degree and Criminal Usury.

3. James Darienzo, a/k/a James Martin, Angelo Leonardi and Carmine Lavia were indicted by the Grand Jury of Bronx County on July 19, 1974 (No. 1801/1974) for the crime of Conspiracy in the Fourth Degree and two counts of the crime of Tampering with a Witness.

Affidavit of Robert M. Cohen

4. Carmine Apuzzo, along with three others, was indicted by the Grand Jury of Bronx County on July 19, 1974 (No.1946/1974) for thirty-five counts of Criminal Usury.

5. James Darienzo, a/k/a James Martin was indicted by the Grand Jury of Bronx County on July 31, 1974 (No.1924/1974) and charged with the crime of Possession of a Weapon as a Felony.

6. James Darienzo, a/k/a James Martin, Angelo Leonardi, Ronald Darienzo, Bruce Doak, Carmine Lavia and one other, were indicted on August 2, 1974 (No.1944/1974) by the Grand Jury of Bronx County for the crime of Conspiracy in the Third Degree and for thirteen counts of the crime of Criminal Usury.

7. The indictments were filed as sealed instruments and warrants issued for the arrest of the plaintiffs pursuant to Criminal Procedure Law § 210.10(3). The plaintiffs were arrested pursuant to these warrants by members of the New York City Police Department.

8. The investigations leading to the indictments referred to above were conducted by the Office of Mario Merola, District Attorney of Bronx County. These investigations were directed by Dwight Darcy, an Assistant District Attorney in said office, assisted by Stanley Chesler, a Criminal Law Investigator (an as yet unadmitted law school graduate) in said office. The investigations were carried out with the assistance of members of the New York City Police Department.

9. The actions of defendants Merola, Darcy and Chesler, in relation to the investigation and prosecution of plaintiffs, were

Affidavit of Robert M. Cohen

carried out in the course of their official duties as District Attorney, Assistant District Attorney and Criminal Law Investigator, respectively. The actions of which plaintiffs complain were performed, if at all, by each defendant in the course of his official duties.

10. It is the position of defendants Merola, Darcy and Chesler that for the reasons discussed in the accompanying Memorandum of Law, they are immune from the present suit and that the complaint against them must therefore be dismissed.

WHEREFORE, defendants Mario Merola, Dwight Darcy and Stanley Chesler respectfully request that this motion to dismiss be granted in all respects.

Robert M. Cohen
ROBERT M. COHEN

Sworn to before me this
31st day of October, 1974.

XG
NINA G. SIEGLER
Notary Public, State of New York
No. 24-6127260
Qualified in Kings County
Commission Expires March 30, 1978

Affirmation in Opposition

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MARTIN, et al

Plaintiffs

-against-

74 Civ. 4453

(C.L.B.)

AFFIRMATION IN OPPOSITION

MARIO MEROLA, District Attorney,
Bronx Coun et al

Defendants.

ANDREW P. ZWEBEN, under penalty of perjury affirms:

I am associated with the firm of ROTHBLATT, ROTHBLATT, SEIJAS AND PESKIN, attorneys for the plaintiffs herein. I make this affirmation in opposition to defendants MEROLA'S, DARCY'S, and CHESLER'S Motion to Dismiss the complaint made pursuant to Federal Rules of Civil Procedure 12(b) 6.

The issue raised by the motion is primarily legal but I make this affirmation to relate a factual point relevant to consideration of this motion.

On August 8, 1974 defendant MARIO MEROLA held a "press conference" at which he announced the arrest of the plaintiffs herein.

Defendant MEROLA characterized the plaintiffs as being members of "organized crime families". Copies of newspaper articles reporting this "press conference" and the information released by the defendant MEROLA are attached to this affirmation and made a part thereof.

DATED: NEW YORK, NEW YORK
November 29, 1974

Memorandum And Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MARTIN, et al.,

74 Civ. 4453-CLB

Plaintiffs:

-against-

MARIO MEROLA, D.A. BRONX COUNTY,
et al.,

MEMORANDUM AND ORDER

[Motion of defendants
Merola, Darcy and Chesler]

= Defendants.

Brieant, J.

Defendants Merola, Darcy and Chesler have moved to dismiss the complaint herein pursuant to Rule 12(b)(6), F.R.Civ.P. for failure to state a claim. The Court has read affidavits and exhibits submitted by both sides of the litigation, and treats the motion as having been made under Rule 56.

Movants were at all relevant times, respectively, the District Attorney of Bronx County, New York, an Assistant District Attorney in his office, and an "as yet unadmitted law school graduate" employed in his office under the job title of "Criminal Law Investigator", who will become an Assistant District Attorney automatically when admitted to the bar, performing the same duties as an Assistant

Memorandum And Order

until such date. Other named defendants, not joining in this motion, are detectives or police officers of the City of New York.

Plaintiffs seek damages of Thirteen Million (\$13,000,000.00) Dollars from defendants for "flagrant, wanton and malicious disregard" of plaintiffs' constitutional rights; and found jurisdiction on 42 U.S.C. §1983.

Plaintiffs are six persons charged in various indictments presently pending in the courts of New York State, Bronx County, with serious crimes of the sort ordinarily associated with what is called, euphemistically, "Organized Crime". Included in the indictments are counts of criminal usury, conspiracy, tampering with a witness, and felony possession of a weapon.

While an attorney's affidavit carries very little weight on a motion of this kind, we take as true for purposes of this motion, the "affirmation" of Andrew P. Zweben, dated November 29, 1974, read in opposition to the motion.

Plaintiffs allege that they were indicted, that the indictments were sealed and warrants issued, that they were not

Memorandum And Order

given an opportunity to surrender, although they had asked for an "opportunity to do so" through their attorneys (Complaint, ¶3). This is a frivolous allegation, because surrender pursuant to a warrant is a unilateral act, which can be accomplished merely by turning up at any precinct and asking to be arrested and brought before a magistrate pursuant to the outstanding warrant. We know of no rule of law which requires that a defendant in a sealed indictment be given any "opportunity" of the sort described; indeed such dealings between law enforcement officers and those charged with serious crime tend to injure public confidence in law enforcement, suggesting as they do, a double standard, or special treatment of "organized crime" as contrasted with "street crime" where arrests are sudden and free from ceremony or treaty.

Plaintiffs Carmine Apuzzo and Angelo Leonardi plead the existence of medical conditions so grievous that it would seem impossible for either of them to have engaged in the sort of criminal activity with which they are charged. Apuzzo, we are told, was arrested while en route to his doctor, held for three hours processing, refused medical attention, and "detained in the bull pen" without food, drink or medical assistance until

Memorandum And Order

his arraignment the following morning. Because of state court calendar congestion he waited in court for five hours, and was not bailed until the following morning. Apparently (¶7) the arraignment judge was somewhat skeptical about his claimed need for medical care. No facts are set forth from which we may impute liability for any of these conditions or circumstances upon the District Attorney or his staff. However manifold may be their duties, they do not preside over arraignment part or the detention facilities. If plaintiff was abused or neglected by any policeman or guard, he may have an action, but liability under respondeat superior does not exist as to these movants in this case.

Leonardi's health complaints did receive attention immediately upon his arrest, but at Jacobi Hospital, rather than at "his own hospital" (Complaint, ¶9). This aspect of the complaint is also frivolous.

On the motion, plaintiffs showed that on August 2, 8 and 9, 1974 defendant Merola advised the press of the status of proceedings affecting them "as a result of the information furnished by prosecutor Merola, stories of a somewhat lurid and

Memorandum And Order

sensational nature appeared in the press. Briefly summarized, these articles indicated [New York Times, August 9, 1974] that with the aid of "an electronic bugging device," a "usury ring focusing on small-business men in the Bronx has ... been broken." Plaintiff Darienzo was described as the "ringleader," and said to be "strongly connected with the Tramunti crime family." Names and addresses of those indicted were listed. A New York Post article on August 8, 1974 quotes defendant Merola as announcing the arrests, and describes the nature of the criminal activities involved. It is clear that the statement describes charges only, rather than proven conduct. In the Post, unspecified members of the loansharking ring are also described as "linked directly to the Tramunti and Columbo crime families." The Times Herald Record of August 9, 1974 describes the arrests of 17 persons, including plaintiffs here, and notes that two of the 17 are "members of the organized crime families of Carmine Tramunti and Joseph Columbo."

It is clear that Merola and his two assistants, movants here, were acting in their official capacity as prosecutors and clothed with judicial immunity from actions for money damages "based on non-malicious conduct in their official capacity" within

Memorandum And Order

their jurisdiction. Palermo v. Rockefeller, 323 F.Supp. 473, 485 (S.D.N.Y. 1971); Pierson v. Ray, 386 U.S. 547 (1967). No evidence of bad faith or actual malice on the part of movants was shown, and the bare allegations of misconduct by "defendants" lumped together, are insufficient.

Assuming, as we must for purposes of this motion, that the somewhat conflicting press accounts quote Merola correctly, no malice may be inferred therefrom. The District Attorney has wide discretion in the conduct of criminal prosecution, and in deciding what matters to present to the grand jury. He is an important elected official of the County. His work is intimately connected with the public good; diligent performance of his duties are matters of vital public interest concerning which the public has a "right to know", and the media a legitimate interest in reporting, not only indictments and arrests, but their significance. Scope of the latter includes information about the extent and nature of the alleged loansharking racket, its methods of operation, the electronic means employed to detect it. Disclosure of the criminal affiliations of the defendants with the various well known local "families" was, arguably, a failure to comply with the ABA Standards Relating to the Administration of

Memorandum And Order

Criminal Justice, Fair Trial and Free Press, Part II, §2.1(c)(1), which do not appear to have the force of law in New York. Also, there may have been a breach of SDR 7-107(B)(1) of the Code of Professional Responsibility adopted by the New York State Bar Association (Judiciary Law, McKinney's Supp. 1974). If so, this breach of prosecutorial responsibility does not amount to a "deprivation of ... rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. §1983.

While the last chapter in the "fair trial-free press" controversy remains to be written, and while prejudicial pre-trial utterances may justify trial delay or change of venue in a proper case, we are not prepared to say that a state district attorney will subject himself to civil liability in this Court for statements such as those attributed to him here. Apart from the right of the public to know, it would seem that the prosecutor should enjoy some right of free speech so as to permit him to account through the media to the voting public for his stewardship of his important public trust. Regrettably, when, as here, a prosecutor announces some action against organized crime operations, it is regarded as newsworthy, and somehow contrasting with the daily scining for small fish which seems to be the rule in many such offices.

Memorandum And Order

Summary Judgment is granted and the Complaint is dismissed as to movants Merola, Darcy and Chesler. There is no just reason for delay. Rule 54(b), F.R.Civ.R. Our Clerk shall enter final judgment in favor of all three movants dismissing the Complaint and denying all relief as to them.

So Ordered.

Dated: New York, New York
January 23, 1975

CHARLES L. BRIEANT, JR.
CHARLES L. BRIEANT, JR.
U. S. D. J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MARTIN, ANGELO LEONARDI,
CARMINE LAVIA, CARMINE APUZZO,
RONALD DARIENZO, BRUCE DOAK,

Plaintiffs

-against-

74 Civil 4453 (C.L.B.)
NOTICE OF APPEAL

MARIO MEROLA, District Attorney
Bronx County and individually,
P.O. SAL BANASEVINEO, P.O. "JOHN"
HARDEMAN, P.O. "JOHN" NIXON, A.D.A.
DWIGHT DARCH, DET. MIKE TERILLY,
P.O. DONALD SULLIVAN, DET. JOHN
RYAN, A.D.A. STAN CHESLER,

Defendants.

PLEASE TAKE NOTICE that the plaintiffs hereby appeal
to the United States Court of Appeals for the Second Circuit
from the order of HON. CHARLES A. BRIEANT rendered on
January 23, 1975 and the judgment entered thereon on January 31,
1975.

DATED: New York, New York
February 6, 1975

Yours etc.
FOTHBLATT, ROHBLATT, SEIJAS,
& PESKIN
Attorneys for Plaintiffs
232 West End Avenue
New York, New York 10023
(212) 787-7001

To: HON. MARIO MEROLA
District Attorney
Bronx County
851 Grand Concourse
Bronx, New York

by:


ANDREW P. ZWEBEN

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Preston Anderson, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 980 Simpson St
Bronx, N.Y..

That on the 4 day of April, 1975,
deponent personally served the within Appendix

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving true copies of same with a duly
authorized person at their designated office,

By depositing 1 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

Hon Mario Merola
District Attorney - Bronx County
Attorney for Defendant Appellees
851 Grand Concourse
Bronx, N.Y.

Preston Anderson

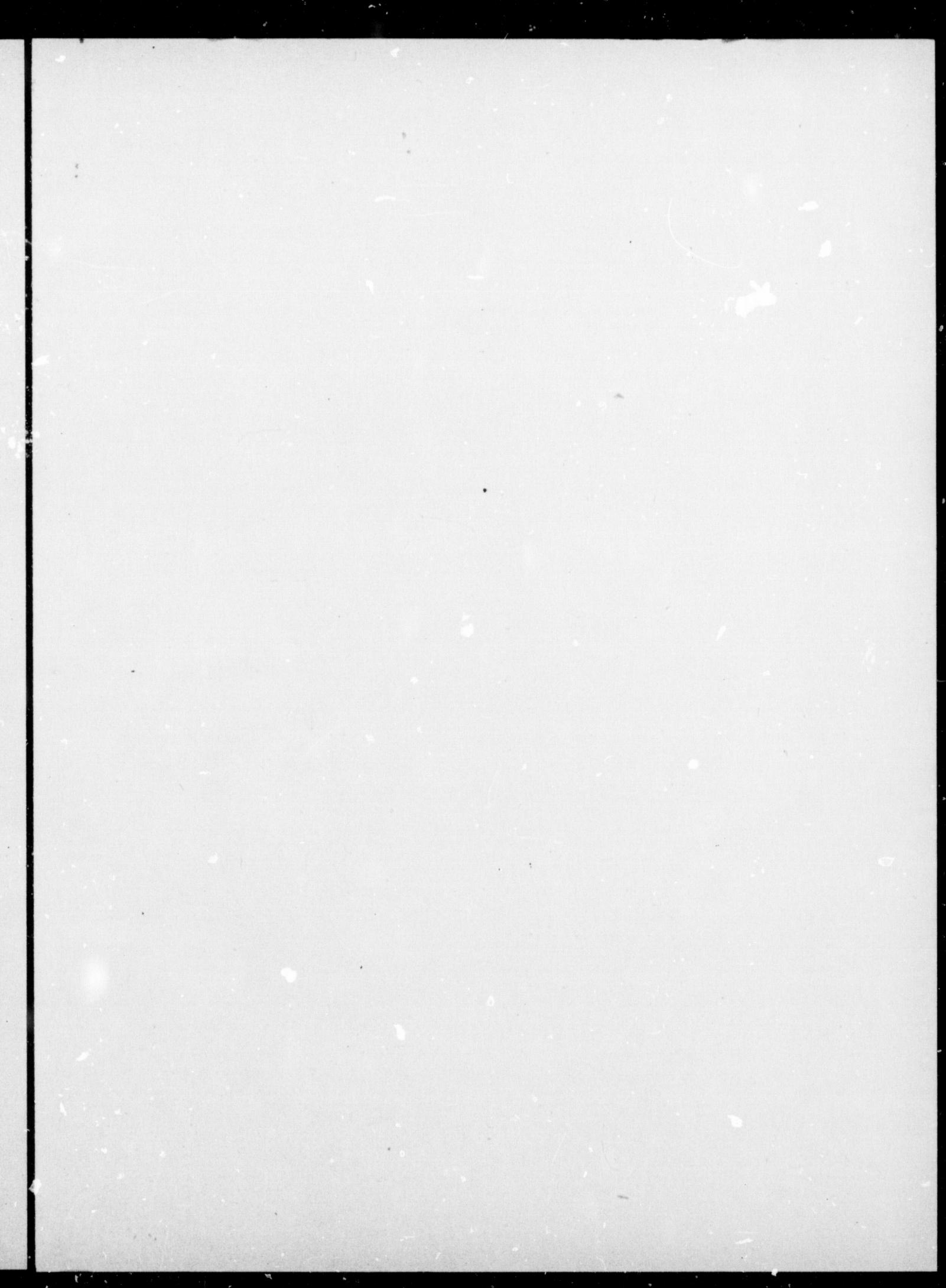
Sworn to before me this

4 day of April, 1975

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-093098
Qualified in Bronx County
Commission Expires March 30, 1978

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Debrah D. West

